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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ROYCE INTERNATIONAL BROADCASTING COMPANY,
PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals misconstrue or disregard the hearing requirements of the Communications Act of 1934, as amended, when it affirmed the Federal Communications Commission's dismissal of a mutually exclusive application on the ground that it lacked an available transmitter site even though the Commission had never designated a site availability hearing issue or permitted the applicant an opportunity to prove its qualifications?[1/]

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1. Petitioner Royce International Broadcasting Company was the appellant before the Court of Appeals, and the Federal Communications Commission was the appellee. Corinthians XIII Broadcasting Company and London Bridge Broadcasting, Inc. (formerly Shoblom Broadcasting, Inc.) were intervenors in favor of the Federal Communications Commission.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS AND AGENCY REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT . .	21
I. The Exercise Of This Court's Supervisory Powers Is Necessary To Permit A Just Result In This Case And To Ensure The Preservation Of Future Applicants' Rights To A Hearing	21
II. The Court Of Appeals' Affirmance Of The FCC's Order Dismissing Royce's Application So Far Conflicts With Statutory Requirements And Agency Precedent As To Warrant This Court's Intervention	30
CONCLUSION	41

APPENDICES

Appendix A (Memorandum of Court of Appeals Accompanying Judgment Affirming the Decisions of the FCC) A-1

Appendix B (Order of the Commission Denying Royce's Application for Review) A-6

Appendix C (Memorandum Opinion and Order of the FCC's Review Board Affirming the Dismissal of Royce's Application) A-10

Appendix D (Order of the FCC's Administrative Law Judge Dismissing Royce's Application) . . A-17

Appendix E (Memorandum Opinion and Order of the FCC's Review Board Affirming the Denial of Royce's Petition for Leave to Amend) A-20

Appendix F (Memorandum Opinion and Order of the FCC's Administrative Law Judge Denying Royce's Petition for Leave to Amend) A-35

Appendix G (Judgment of the Court of Appeals Affirming the Decisions of the FCC) A-48

Appendix H (Order of the Court of Appeals Denying the Petition for Rehearing) A-50

TABLE OF AUTHORITIES

Cases:	Page
Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945)	22
Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978), cert. denied, 441 U.S. 957 (1979)	31
Committee for Community Access v. FCC, 737 F.2d 74 (D.C. Cir. 1984)	31
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)	31
United States v. Storer Broad-Casting Co., 351 U.S. 192 (1956) .	24
Administrative Decisions:	
A.C. Elliott, Jr., 59 F.C.C.2d 56, recon. denied, 59 F.C.C.2d 1287 (Rev. Bd. 1976)	32
Alabama Citizens for Responsive Public TV, Inc., 59 F.C.C.2d 1 (1976)	9
Amendment of Section 73.202(b), Table of Assignments, FM Broad-cast Stations, 44 Rad.Reg.2d (P&F) 644 (Broadcast Bureau 1979)	6
Braverman Broadcasting Co., Inc., 55 F.C.C.2d 15 (1975)	28, 37

TABLE OF AUTHORITIES (continued)

Administrative Decisions:	Page
Catherine Juanita Henry, 50 Fed. Reg. 24043 (Hearing Designation Order, released May 28, 1985) . .	38
Commercial Radio Institute, Inc., 46 F.C.C.2d 1110 (Rev. Bd. 1984)	34
Dale A. Owens, 56 F.C.C.2d 428 (Rev. Bd. 1975)	37
Grand Radio, Inc., 57 Rad.Reg.2d (P&F) 30 (Rev. Bd. 1984)	36
Gross Broadcasting Co., 46 Rad.Reg.2d (P&F) 1091 (1979) . . .	32
J. Sherwood, Inc., 63 F.C.C.2d 151 (Rev. Bd. 1976)	34
Kaye-Smith Enterprises, 98 F.C.C.2d 675 (Rev. Bd. 1984), recon. denied, FCC 84R-55 (released August 7, 1984), review denied, FCC 85-792 (released April 19, 1985), appeal docketed No. 85-1266 (D.C. Cir. May 1985) .	26
Las Misiones de Bejar Television Co., 93 F.C.C.2d 191 (Rev. Bd. 1983), review denied, 56 Rad.Reg.2d (P&F) (1984), appeal docketed No. 84-1255 (D.C. Cir. June 18, 1984)	32
Liberty television, 18 F.C.C.2d 924 (Rev. Bd. 1969)	32

TABLE OF AUTHORITIES (continued)

Administrative Decisions:	Page
Northbanke Corp., 46 Rad.Reg.2d (P&F) 453 (1979)	34
Radio Ridgefield, Inc., 58 F.C.C.2d 134 (Rev. Bd. 1976) . . .	37
Revised Processing of Broadcast Applications, 72 F.C.C.2d 202, (1979)	8, 27
The Old Time Religion Hour, 95 F.C.C.2d 713 (Rev. Bd. 1984), recon. denied, 96 F.C.C.2d 551 (Rev. Bd. 1984), review denied, 57 Rad.Reg.2d (P&F) 1147 (1985), appeal docketed No. 85-1207 (D.C. Cir. April 4, 1985)	26
Tri-County Stereo, Inc., 50 F.C.C.2d 170 (Rev. Bd. 1974) . . .	34
Valley FM Radio, 99 F.C.C.2d 924 (Rev. Bd. 1984)	36
Washington's Christian TV Outreach, Inc., 94 F.C.C.2d 1360 (Rev. Bd. 1983)	26
Western Television Co., 49 F.C.C.2d 1110 (Rev. Bd. 1974)	34

Statutes and Regulations:	Page
28 U.S.C. § 1254(1)	3
47 U.S.C. § 309(a)	3
47 U.S.C. § 309(e)	4, 23, 24

TABLE OF AUTHORITIES (continued)

Statutes and Regulations:	Page
47 U.S.C. § 402(b)	18
47 C.F.R. § 73.3593	24

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Royce International Broadcasting Company ("Royce") petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on June 21, 1985.[2/]

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2. Royce International Broadcasting Company is an unincorporated company whose sole principal and owner is Edward R. Stolz, II.

OPINIONS BELOW

The Memorandum Opinion and Order of the Review Board of the Federal Communications Commission ("FCC") affirming the denial of Royce's petition for leave to amend to specify a new transmitter site (A-20), is reported at 93 F.C.C.2d 1027 and 53 Rad.Reg.2d (P&F) 1203 (1983). The Review Board's Memorandum Opinion and Order affirming the dismissal of Royce's application (A-10) is reported at 95 F.C.C.2d 444 (1983). The orders of the FCC's Administrative Law Judge denying Royce's petition for leave to amend (A-35) and dismissing Royce's application (A-17), the Commission's Order affirming the Review Board's decisions (A-6), and the judgment (A-48) and memorandum (A-1) of the Court of Appeals for the District of Columbia Circuit affirming the agency's actions and the Court's order denying appellant's petition for rehearing (A-50), are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit (A-48) was entered on April 30, 1985. The order denying rehearing (A-50) was entered on June 21, 1985. On September 16, 1985, Chief Justice Warren E. Burger extended the time for filing this Petition for Certiorari until October 3, 1985. Royce is filing this petition within that time.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND AGENCY REGULATIONS INVOLVED

Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309, provides:

> (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the grant of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice,

shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

. . . .

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than 30 days after the publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 73.3593 of the Commission's Rules, 47 C.F.R. § 73.3593, provides:

> If the FCC is unable, in the case of any applicant for an instrument of authorization, to make the findings specified in § 73.3591(a), it will formally designate the application for hearing on the grounds or reasons then obtaining and will forthwith notify the applicant and all known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally.

STATEMENT OF THE CASE

Royce is the victim of result-oriented agency action in which its rights to a full hearing on its qualifications to be an FCC licensee were subordinated to expediency. This case originally involved seven mutually exclusive applicants seeking authority from the FCC to construct a new FM station; six applications were for a station in Yucca Valley, California; Royce's application was for a new station at Desert Hot Springs,

California.[3/] Because the applications were mutually exclusive, the Commission designated them for a hearing on several specific issues, including a determination as to which community should receive the new station. See Hearing Designation Order, 47 Fed. Reg. 12855 (March 25, 1982). By the time the hearing commenced, however, counsel to the Yucca Valley applicants advised the Presiding Administrative Law Judge ("ALJ") that those Yucca Valley applicants which had not already withdrawn from the comparative contest had reached a tentative settlement agreement whereby Corinthians XIII Broadcasting Company ("Corinthians") would remain the sole Yucca Valley applicant. The pendency of Royce's

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3. FM Channel 295 was assigned to Yucca Valley in 1979. Amendment of Section 73.202(b), Table of Assignments, FM Broadcast Stations, 44 Rad.Reg.2d (P&F) 644 (Broadcast Bureau, 1979). At that time, Section 73.203(b) of the Commission's Rules (47 C.F.R. § 73.203(b)) allowed a party to apply for a station which would be located in a community within 15 miles of the community to which the channel was assigned.

application, therefore, constituted the only barrier to granting Corinthians' application.

In pursuit of a speedy end to the proceeding, the Commission first arbitrarily employed its procedural rules to block Royce's attempt to cure a potentially disqualifying defect in its application by amending the application to specify a new location for its transmitter tower. Thereafter, without designating a site availability hearing issue or otherwise providing Royce an opportunity to prove that the transmitter site proposed in its application was available--which it was--the Commission dismissed Royce's application.

In its application, Royce indicated that it would construct its transmitter tower at a site located on Eureka Peak in the Joshua Tree National Monument which was under the management of the National Park Service of the U.S. Department of the Interior. Both before and after the issuance of the Hearing

Designation Order,[4] Corinthians challenged the availability of the proposed site and urged either the dismissal of Royce's application or the addition of hearing issues to determine whether Royce had misrepresented the availability of its transmitter site and whether, indeed, the site was available. In response, Royce set forth its basis for believing that it had reasonable assurance of the availability of the Eureka Peak site when its application was filed. In its opposition pleadings filed on February 2, 1981, and on June 2, 1982, Royce included January, 1981, letters from the Superintendent of the Joshua Tree National Monument and the Regional Director of the National Park Service which,

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4. Corinthians' allegations were originally raised in a petition to deny. However, in Revised Processing of Broadcast Applications, 72 F.C.C.2d 202 (1979), the Commission revised its procedures so as to eliminate issue pleading in comparative broadcast hearings prior to designation for hearing, and to require that such issues be raised by post-designation pleadings pursuant to Section 1.229 of the Commission's Rules. Hence, Corinthians refiled its allegations as a petition to enlarge issues after release of the Hearing Designation Order.

while indicating the Park Service's reluctance to permit use of the site as a transmitter tower, confirmed Royce's assertion that the site was proposed in good faith.[5/]

Although Royce's principal, Edward R. Stolz, II, expressly indicated on several occasions his belief that he could ultimately obtain final approval for use of the Eureka Peak site, and he continued to pursue such approval, once Royce learned of the Park Service's then-current inclination to withhold its approval, it explored numerous alternative sites for the location of its transmitter tower. In announcing its intent to use a different transmitter site in order to expeditiously resolve its site problem, Royce's pleading acknowledged that "[i]t now

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5. In considering questions of site availability, the Commission's position is that "neither absolute assurance nor legal control of a site is necessary, but only that when an applicant proposed a site, he must have done so in good faith that the site will be available to him." Alabama Citizens for Responsive Public TV, Inc., 59 F.C.C.2d 1, 2-3 (1976).

appears to Royce that its originally proposed site is not available . . ." Royce's Opposition to Petition to Enlarge Issues, filed June 2, 1982. In an accompanying affidavit, Mr. Stolz explained the basis for his plans:

> Because of the problems inherent in obtaining a "final" approval for use of land controlled by the Interior Department, the county-controlled lands option appears to be the more practical solution to the obtaining of a "firm" decision at an early date, and to meeting the strict spacing and terrain requirements of the instant proposal. (Id., Attachment C, p. 3.)

Securing a new transmitter site suitable for serving Desert Hot Springs was a difficult task. The potential sites were significantly restricted by FCC engineering requirements, as well as the harsh terrain. From early 1981 into the fall of 1982, Royce pursued the availability of several sites, culminating in its approval from the Southern Pacific Land Company to use the transmitter site of KPLM(FM). On October 22, 1982, the date the hearing commenced, Royce filed a petition for

leave to amend its application to propose the KPLM(FM) site.[6/]

The ALJ denied Corinthians' petition to add site availability and misrepresentation issues against Royce. See Memorandum Opinion and Order, FCC 82M-3157 (released October 13, 1982). After noting that Corinthians had failed to show that Royce's representations were not true, therefore precluding the addition of a misrepresentation issue, the ALJ denied the request for a site availability issue "[s]ince the site originally proposed by Royce is now said by them to be unavailable and since Royce has lately filed a petition for leave to amend to specify a new site . . ." Id. at p. 2.

At the October 22, 1982 hearing, and at other subsequently scheduled hearing sessions,

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6. Three weeks earlier, Royce had filed a petition for leave to amend to specify a new site on Wide Peak. Unfortunately, there was an unforeseen problem with that site which would have required a waiver of the Commission's spacing requirements between stations. Hence, on October 22, in filing its petition for leave to amend to specify the KPLM(FM) site, Royce withdrew its earlier-filed amendment.

only Royce was ready to proceed, and testimony was taken from its witness. The ALJ repeatedly extended the hearing schedule, not at Royce's request, but in order to enable Corinthians and the other Yucca Valley applicants to finalize their settlement agreements, to file appropriate pleadings with the Commission (including a petition for leave to amend Corinthians' application to reflect its new ownership structure), and to revise their hearing exhibits to conform with the settlement agreements.[7/] Nevertheless, on January 28, 1983, the ALJ denied Royce's petition for leave to amend its proposed transmitter site to the KPLM(FM) site, finding that Royce had failed to demonstrate good cause for acceptance of its amendment. Shoblom Broadcasting, Inc., FCC 83M-395 (released February 1, 1983) (A-35).

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7. Indeed, it was not until March 10, 1983, that Corinthians filed the joint request for approval of the settlement agreements with Desert Radio, Inc. and Shoblom Broadcasting, Inc. The merger agreement between Corinthians and Buena Vista Broadcasting Company was not filed until the end of June, three days after the dismissal of Royce's application.

The day after release of the ALJ's order, Corinthians filed a petition to dismiss Royce's application urging that Royce was without a transmitter site and, as such, its application was incomplete and could not be granted. Royce, however, sought and was granted permission to file an interlocutory appeal with the Review Board. See Order, FCC 83M-531 (ALJ, released February 11, 1983). In view of Royce's appeal and the Yucca Valley parties' failure to file their settlement agreements, Royce, with the consent of Corinthians, also moved to suspend all the procedural dates in the case. See Royce's Motion for Suspension of Procedural Dates, filed February 15, 1983. Specifically, Royce requested that the procedural dates, including the date by which Royce must submit its opposition to Corinthians' petition to dismiss Royce's application,

> be held in abeyance until a further prehearing conference to be held at a time convenient for the Presiding Judge and all participating parties as soon as practicable after the appeal has been resolved.

Id. at p. 3. That request was also granted. Order, FCC 83M-598 (ALJ, released February 18, 1983).

By Memorandum Opinion and Order released April 22, 1983, the Review Board affirmed the ALJ's denial of Royce's site amendment. Shoblom Broadcasting, Inc., 93 F.C.C.2d 1027 (Rev. Bd. 1983) (hereinafter "Amendment Decision") (A-20). The Board found that Royce's petition did not satisfy the good cause criteria for acceptance of amendments, stressing that Royce had known since January 1981 that its originally proposed site was not available. Id. at 1029 (A-25 - A-27). The Board also chastised Royce for not promptly advising the Commission of the information contained in the January 1981 National Park Service letters received by Mr. Stolz (see id. at 1029 n. 4 (A-26)), even though Royce had provided the Commission with copies of those letters in its February 2, 1981 opposition to Corinthians' petition to deny. The Board then purported to weigh both

the public policy favoring the acceptance of amendments designed to cure potentially disqualifying defects in an application and the public policy favoring settlements, and harshly concluded:

> Given these competing policy interests and Royce's utter lack of "equities" here, we conclude that a probable loss of choice among applicants is preferable to whitewashing the fatal deficiency in Royce's application and disrupting this proceeding further. The public interest compels a modicum of diligence on the part of applicants so that the initiation of a new broadcast service is not held hostage to the malfeasance (and non-feasance) of would-be licensees. (Id. at 1032 (A-34).)

Thereafter, without calling a further pre-hearing conference (as Royce had requested in its motion granted by the ALJ), or issuing any order to show cause or any other notice, the ALJ granted Corinthians' February 2, 1983, petition to dismiss Royce's application. Order, FCC 83M-2027 (ALJ, released June 21, 1983) (A-17). The ALJ noted that Corinthians' petition was unopposed, and concluded that Royce had no transmitter site and, thus, was without a viable application. Id. (A-18 -

A-19). The ALJ made these findings without ever having designated a site availability issue or permitting Royce the opportunity to prove that its unamended application was grantable.

Royce appealed the dismissal of its application to the Review Board, submitting that the ALJ erred in failing to either afford Royce an opportunity to file an opposition to Corinthians' petition to dismiss or to add a site availability issue and allow Royce an opportunity to present evidence on that issue. Moreover, Royce advised the Review Board that it was prepared to present evidence that it had succeeded in its continuing efforts to pursue final authorization to use its originally specified transmitter site at Eureka Peak in the Joshua Tree National Monument.[8/]

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8. Royce did not submit its evidence of site availability, which included a July 7, 1983, letter from the Regional Director of the Western Region of the National Park Service setting forth the conditions under which the site is available to Royce. However, Royce noted that the issue of the availability of its site was not before the Board; "[r]ather, this appeal raises only the failure of the ALJ to permit Royce to present evidence that its site is available." Id. at p. 3 n.**.

The Review Board denied Royce's appeal. Shoblom Broadcasting, Inc., 95 F.C.C.2d 444 (Rev. Bd. 1983) (hereinafter "Dismissal Decision") (A-10). The Board found that the dismissal of Royce's application after the denial of its site amendment was merely a ministerial act. Asserting that Royce had conceded that its original site was not available, the Board reasoned that there was no question of fact outstanding on which to base the designation of a site availability issue. Id. at 445-46 (A-13 - A-14). Even if Royce's original site had again become available, it was

> simply happenstance or coincidence. The operative question is: did Royce have reasonable assurance of the site when it said it did. It clearly did not. Having known . . . that its originally-proposed site was unavailable, . . . Royce's application became patently defective at that point, and anytime thereafter the defect could only be cured by an amendment accompanied by a suitable good cause showing.

Id. at 446 (A-15 - A-16). The Board, thus, concluded that any error by the ALJ in dismissing Royce's application was harmless. Id. (A-16).

Royce filed an application for Commission review of both of the Review Board's decisions. The Commission denied Royce's application for review (Order, FCC 84-119 (released April 2, 1984) (A-6)), and, pursuant to Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), Royce appealed the agency's orders to the U.S. Court of Appeals for the District of Columbia Circuit. Royce International Broadcasting Company v. FCC, Case No. 84-1168.

Royce appealed two questions. First, Royce charged that it should have been permitted to amend its application to specify a new transmitter site. Second, Royce asserted that, following the denial of its amendment, Royce should have been afforded an opportunity to prove at hearing that the transmitter site appearing on the face of its application was available and, hence, Royce possessed the necessary qualifications to be a licensee.

The Court of Appeals affirmed the Commission's dismissal of Royce's

application (A-48). On the first point, the court concluded that in rejecting Royce's amendment, the Review Board had applied appropriate Commission precedent for analyzing the acceptability of amendments and that Royce had failed to show "that the equities in its favor were so overwhelming as to make the Board's decision arbitrary or capricious." Memorandum, pp. 1-2 (A-1 - A-2).

Then, operating from the presumption that it was "uncontested" that the Board's denial of the site amendment left Royce's application bearing a disqualifying defect, the court found no reason for the Commission to designate a site availability issue and grant Royce an opportunity to prove its qualifications. Id. at 2-3 (A-3 - A-4). The court reasoned:

> It is precisely because denial of leave to amend a disqualifying defect ordinarily implies that the application will be dismissed that the Commission relaxes the due diligence requirement when considering proposed curative amendments. There would be no need to relax the due diligence requirement on the grounds that the "public interest is best served by having as many qualified applicants

> as possible competing for each broadcast facility," Azalea Corp., 31 F.C.C.2d 561, 563 (1971), if an applicant who was denied leave to amend a disqualifying defect was presumptively entitled to have the same underlying issue designated for relitigation at the subsequent hearing set for competing applications.

Id. Finally, the court held that any error by the ALJ in dismissing Royce's application prior to holding a further prehearing conference as he had ordered would be the case, or prior to receiving an opposition pleading to the motion to dismiss, was harmless because "it is clear that Royce had no reasonable assurance of any transmitter site on June 21, 1983, when its application was dismissed" and because "Royce plainly should have been aware that its application might be dismissed once the Review Board denied leave to amend." Id. (A-4 - A-5).

In petitioning for rehearing, Royce demonstrated that the court misapprehended the relationship of curative amendments to the hearing procedures employed in determining an applicant's qualifications, and overlooked an unbroken line of cases in which applicants

in Royce's situation were permitted an opportunity to prove that their applications were not fatally defective. A petition for leave to amend has never before been held to supplant an applicant's opportunity to litigate a qualifying issue; hence, the court, as did the Commission before it, erred in finding that Royce had no site. Moreover, Royce showed that in view of clear Commission precedent requiring the designation of a site issue in such instances, the conclusion that Royce "plainly" should have anticipated the dismissal of its application was wholly unfounded. Nevertheless, the Court of Appeals denied Royce's petition for rehearing. (A-50).

REASONS FOR GRANTING THE WRIT

I. THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS IS NECESSARY TO PERMIT A JUST RESULT IN THIS CASE AND TO ENSURE THE PRESERVATION OF FUTURE APPLICANTS' RIGHTS TO A HEARING

This Court has previously found it necessary to intervene on behalf of an applicant where the Commission has paid mere lip

service to the applicant's statutory rights to a hearing. In Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), the Court held that where two bona fide applications are mutually exclusive, the grant of one without a hearing on both deprives the loser of the opportunity for a hearing provided it by the Congress. So too in this case has the Commission put form over substance and, in an inexplicable departure from agency practice, has denied Royce its statutory right to a full hearing before dismissal of its application.

Royce's application was dismissed on the ground that it lacked an available transmitter site. Yet, Royce's application, on its face, specified a transmitter site at Eureka Peak which was proposed in good faith and, as Royce advised the Review Board, Commission, and the Court of Appeals, is a site for which Royce was successful in securing final authorization to use. Royce, however, was never provided an opportunity to prove that its proposed site was available and that its

application was grantable. Denial of that opportunity was a fundamental infringement of Royce's rights as an applicant before the FCC. The Court of Appeals' affirmance of the agency's decision not only imposes an unjust result in this case, but also threatens to place at risk the procedural rights of future applicants who, for any number of arbitrary reasons, are disfavored by the FCC.

Prejudicial error was committed in finding that Royce lacked an available transmitter site without that issue ever being tried. Section 309(e) of the Communications Act requires the Commission, if it is unable to find that grant of an application would serve the public interest, convenience, and necessity, to set the application for hearing "specifying with particularity the matters and things in issue . . ." See 47 U.S.C.

§ 309(e).[9] See also 47 C.F.R. § 73.3593. As this Court has previously recognized,

> a "full hearing" under § 309 means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . . Such a hearing is essential for wise and just application of the authority of administrative boards and agencies. United States v. Storer Broadcasting Co., 351 U.S. 192, 202 (1956).

The Court of Appeals excused the denial of Royce's right to prove its qualifications on the basis that it was "uncontested" that the rejection of Royce's site amendment meant the application bore a disqualifying defect and, concluding from that presumption, that any error was harmless because it was "clear"

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9. Section 309(e) also makes clear that any hearing "upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission." 47 U.S.C. § 309(e).

that Royce lacked a transmitter site when its application was dismissed. Yet the rejection--or even the acceptance--of an amendment does not, by itself, resolve the question of whether an application is or is not grantable. Whether Royce's application was defective following the denial of its site amendment was far from settled; it was the very issue which should have been designated for hearing.

The filing of a petition for leave to amend has never been held to supplant an applicant's opportunity to demonstrate at the hearing that its application is grantable. Where the Commission believes an application bears a defect precluding the application's grant, it is required to designate the specific issue for hearing. The applicant, however, may attempt to overcome its apparent defect in any number of ways: for example, it may seek a waiver of Commission requirements

and demonstrate its entitlement thereto;[10] it may introduce evidence to prove that the apparent defect is illusory or otherwise not disqualifying;[11] or it may prove that the defect has been cured.

Seeking leave to amend its application is but one avenue an applicant can follow in its effort to cure an apparent defect. However, merely because an applicant may be able to prove it is qualified if permitted to

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10. See, e.g., The Old Time Religion Hour, 95 F.C.C.2d 713 (Rev. Bd. 1983), recon. denied, 96 F.C.C.2d 551 (Rev. Bd. 1984), review denied, 57 Rad.Reg.2d (P&F) 1147 (1985), appeal docketed No. 85-1207 (D.C. Cir. April 4, 1985) (applicant permitted to attempt to meet a main studio location issue first by proving that it was entitled to a waiver of the rule requiring the location of the studio in the community of license, and then when that failed, by amending its application to relocate its studio).

11. See, e.g., Kaye-Smith Enterprises, 98 F.C.C.2d 675, 676-77 (Rev. Bd. 1984), recon. denied, FCC 84R-55 (released August 7, 1984), review denied, FCC 85-792 (released April 19, 1985), appeal docketed No. 85-1266 (D.C. Cir. May 1985) (evidence submitted at hearing as to costs of equipment and availability of funds to meet costs was sufficient to resolve financial issue in applicant's favor); Washington's Christian TV Outreach, Inc., 94 F.C.C.2d 1360, 1362-64 (Rev. Bd. 1983) (proceeding remanded to permit applicant a further opportunity to meet a financial issue by showing that its financing source was capable of fulfilling its credit arrangement).

amend does not mean that it would be unable to meet its burden absent an amendment.

The apparent defect in Royce's application was that the Eureka Peak site was no longer available to it. Under the Communications Act, Royce was entitled to an opportunity to prove that it possessed reasonable assurance of its proposed site. Its attempt to amend to a new site did not resolve that issue. Indeed, the matter litigated by its petition for leave to amend was not whether Royce had reasonable assurance of any site, but whether it had shown good cause to merit acceptance of an amendment. Whether an amendment, once accepted, actually does what it was intended to do (that is, cure a potentially disqualifying defect) is determined in future litigation, e.g., pursuant to a motion for summary decision or proposed findings of fact and conclusions of law. See Revised Processing of Broadcast Applications, supra, 72 F.C.C.2d at 212 (following acceptance of amendment, a motion for summary decision

or deletion of issue would be in order). Likewise, the denial of leave to amend does not constitute a determination that the applicant is unable to meet the issue, only that the applicant must prove its qualifications without the benefit of an amendment.

By seeking leave to amend its application, Royce sought to eliminate the risk of being unable to prove the availability of its proposed site. Just as the Commission recognized in Braverman Broadcasting Co., Inc., where it designated a contingent site issue to be litigated if the applicant's curative amendment was not accepted, it was "apparent [Royce would] have difficulty obtaining [use of] the property originally proposed for its transmitter site." 55 F.C.C.2d 15, 17 (1975). Granted, it might have been difficult, but that did not mean that Royce would be unable to get Park Service approval for its use of the Eureka Peak site if left with no other option than to prove its qualifications based on its

original proposal. That Royce did get approval proves that Royce could have met its burden.

In short, it was neither "uncontested" that Royce's application bore a disqualifying defect, or "clear" that Royce lacked a transmitter site. The issue of whether Royce possessed reasonable assurance of the availability of the transmitter site named in its application was never litigated; the only matter tested was whether Royce would be permitted to prove its qualifications by using a new site. Hence, the opportunity denied Royce was not one to "relitigate" the same issue, as the Court of Appeals suggested. See Memorandum, p. 3 (A-4). On the contrary, the opportunity denied to Royce was its basic right to demonstrate that its application was, indeed, grantable and entitled to full consideration.

II. THE COURT OF APPEALS' AFFIRMANCE OF THE FCC'S ORDER DISMISSING ROYCE'S APPLICATION SO FAR CONFLICTS WITH STATUTORY REQUIREMENTS AND AGENCY PRECEDENT AS TO WARRANT THIS COURT'S INTERVENTION

The dismissal of Royce's application without first affording Royce the opportunity to prove the availability of the transmitter site specified in its application, especially in view of Royce's representations that it was prepared to produce such evidence, not only runs afoul of the hearing requirements established by Congress, but also reflects such a gross departure from agency practice and precedent that this Court's intervention is warranted. The Court of Appeals normally insists that FCC decisions reflect the fair application of its policies and precedent, and that any inconsistent treatment of parties be accompanied by a reasoned analysis

of its contrary judgment.[12/] In this case, however, the Court of Appeals turned its back in disinterest on the gross injustice perpetuated against this particular applicant. If this Court declines to intervene on behalf of petitioner, the FCC will have a free hand to deny any party's hearing rights whenever the agency finds it expedient to do so. This Court must foreclose such a result.

The Commission recognizes its statutory obligation to provide applicants hearing rights by requiring the designation of a specific issue to support a finding adverse

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12. See, e.g., Committee for Community Access v. FCC, 737 F.2d 74, 77 (D.C. Cir. 1984); Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 49 (D.C. Cir. 1978), cert. denied, 441 U.S. 957 (1979); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

to a party.[13/] Yet in this case, the Review Board justified dismissing Royce's application without designating or trying a site availability issue by reasoning that since

> Royce conceded in June 1982 that its proposed site was not available . . ., there was no 'substantial and material question of fact' concerning this matter from that time onward and, therefore, no basis for the ALJ to designate a site issue . . .

Dismissal Decision, supra, 95 F.C.C.2d at 446 (A-13 - A-14). In holding that it was "uncontested" that Royce's application bore a disqualifying defect following the denial of leave to amend, the Court of Appeals appears

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13. See, e.g., Las Misiones de Bejar Television Co., 93 F.C.C.2d 191, 196 (Rev. Bd. 1983), review denied, 56 Rad.Reg.2d (P&F) 1481 (1984), appeal docketed, No. 84-1255 (D.C. Cir. June 18, 1984) (finding that outsic person actually controlled the applicant is reversed due to absence of specific real-party-in interest issue); A.C. Elliott, Jr., 59 F.C.C.2d 56, recon. denied, 59 F.C.C.2d 1287 (Rev. Bd. 1976) (specific ascertainment issue required); Liberty Television, 18 F.C.C.2d 924 (Rev. Bd. 1969) (specific issue on efficiency of a proposal needed to support a decision on that basis); accord Gross Broadcasting Co., 46 Rad.Reg.2d (P&F) 1091, 1097 (1979) (financial amendment accepted in case remanded where applicant never had opportunity to have its financial proposal tested in hearing).

to concur in the Board's rationale. See Memorandum, p. 2 (A-3). This rationale, however, is not defensible.

In the first place, the Board's conclusion that there was no question of fact in issue is unsupported by the record. An examination of Mr. Stolz' affidavits which accompanied Royce's pleadings confirms that Royce never abandoned its first site, the Eureka Peak site, and that Mr. Stolz continued to believe that he would receive final permission to use that site. Furthermore, it is clear that Royce did have reasonable assurance of the site, at least as of July 7, 1983, the date of the Park Service letter to Mr. Stolz confirming the site's availability.

Furthermore, the rationale employed by the Court of Appeals and the Review Board is wholly at odds with prior Commission application of hearing requirements in comparative broadcast proceedings. Even where an applicant concedes the existence of doubt as to

the availability of its proposed transmitter site, outright dismissal of its application is not justified and is not imposed. To the contrary, the Commission requires the enlargement of issues in such instances. See, e.g., Tri-County Stereo, Inc., 50 F.C.C.2d 170, 171 (Rev. Bd. 1974) (site availability issue added where applicant concedes originally specified site is no longer available); Western Television Co., 49 F.C.C.2d 528, 529 (Rev. Bd. 1974) (same); Commercial Radio Institute, Inc., 46 F.C.C.2d 1110, 1111 (Rev. Bd. 1974) (same); cf. Northbanke Corp., 46 Rad.Reg.2d (P&F) 453 (1979) (site issue added where zoning board advised Commission that site was no longer available for a transmitter); J. Sherwood, Inc., 63 F.C.C.2d 151, 156 (Rev. Bd. 1976) (site issue added following adverse decision of zoning authority).

The reason issues are added and tried even where an applicant concedes difficulties with its proposed site is because an appli-

cant's qualifications are determined as of the time of hearing.[14/] In other words, if an applicant succeeds in proving at hearing, prior to the grant of the license, that it is qualified, then its application is eligible to be granted. The Review Board's suggestion that the loss of reasonable assurance at any time during the pendency of an application renders the application patently defective and incurable absent amendment, is without precedent. Indeed, in one recent case, the Review Board dismissed a competitor's motion to dismiss an application as premature even though the applicant "actually learned that its site was no longer available . . . at least 'in the early summer of 1983.'" Instead, the Board found that the "record now

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14. There are really two types of site availability issues: (1) whether the applicant has assurance of a site, in which case an applicant's qualifications are based on the availability of a site at the time of the hearing, and (2) whether an applicant misrepresented the availability of a site, in which case the test is whether an applicant had a site when it represented to have site. There is no misrepresentation issue against Royce; indeed, the ALJ expressly rejected such. See p. 11, supra.

before [it] raises a substantial and material question of fact as to whether [the applicant has reasonable assurance that a suitable transmitter site is available," enlarged the issues and remanded the case to the ALJ for further hearings. Grand Radio, Inc., 57 Rad.Reg.2d (P&F) 30, 31 (Rev. Bd. 1984).[15/]

Moreover, in barring Royce an opportunit from proving its qualifications merely becaus its curative amendment was not accepted, the

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15. The arbitrariness with which Royce was treated by the Review Board is prevalent throughout this proceeding. For example, in note 4 of its Amendment Decision, the Board pointedly chastised Royce for not promptly advising the Commission of the information contained in the January 1981 National Park Servic letters received by Mr. Stolz, charging that those officials' positions were not revealed to the Commission until April 1982 when they were raised by Corinthians' petition to enlarge issues. See Amendmen Decision, supra, 93 F.C.C.2d at 1029 n. 4 (A-26). Yet the Board's accusations are entirely false: Royce promptly filed copies of the January 1981 letters with the Commission as part of its February 2, 1981 opposition to Corinthians' petition to deny. Nevertheless, these aspersions continue to be made against Royce. In one recent Board action, it described its Amendment Decision against Royce as a case "where failure to disclose similar documentary evidence which was inconsistent with the applicant['s] hopes or desires was severely sanctioned." Valley FM Radio, 99 F.C.C.2d 924, 927 (Rev. Bd. 1984). It is clear that Royce was sanctioned for conduct in which it did not, in fact, engage.

Court of Appeals, as did the agency before it, overlooked clear precedent to the contrary. Time and time again the Commission has designated a site availability issue to be litigated following the denial of leave to amend. See, e.g., Radio Ridgefield, Inc., 58 F.C.C.2d 134 (Rev. Bd. 1976) (record reopened and issue added to determine, if site amendment is denied, whether applicant has reasonable assurance of its proposed site); Dale A. Owens, 56 F.C.C.2d 482, 484 (Rev. Bd. 1975) (site availability issue added where applicant conceded originally proposed transmitter site was unavailable and ALJ rejected amendment to specify a new site); Braverman Broadcasting Co., Inc., supra, 55 F.C.C.2d at 17 (where applicant lost assurance of site availability, Commission added contingent site availability issue to be explored if petition for leave to amend is denied). These cases leave no doubt that the denial of leave to

amend does not supplant an applicant's opportunity to prove its qualifications.[16/]

Commission precedent and policy is clear: amending a proposal is only one way an applicant may seek to cure a potentially disqualifying defect, and a determination as to the acceptability of an amendment is not a determination as to an applicant's qualifications. Whether an application is grantable is a determination based on proof of an applicant's qualifications at the time of the grant.

In view of this precedent, Royce, following the rejection of its amendment,

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16. See also, e.g., Catherine Juanita Henry, 50 Fed. Reg. 24043 (Hearing Designation Order, released May 28, 1985). In that case, an applicant had failed to certify its financial qualifications and its pre-designation curative amendment was rejected for lack of good cause. The application was not dismissed; rather, the applicant was given an opportunity to prove its qualifications. In adding an issue, the Commission concluded: "Without that amendment, however [the applicant] does not present the requisite financial qualifications and a standard financial issue has been added." Id. at ¶ 38. Hence, the applicant's unsuccessful efforts to amend its application was no bar to it being provided an opportunity to prove its qualifications; on the contrary, the applicant was--to use the words of the Court of Appeals--"presumptively entitled" to litigate its financial qualifications.

expected that a site availability issue would be added, that it would be given an opportunity to meet that issue, and that it would be found qualified if, at the time of the hearing, it could prove the availability of its proposed site. Although the Court of Appeals faulted Royce for not filing an opposition to Corinthians' motion to dismiss, Royce did not do so--and it certainly did not expect the ALJ to rule on that motion--because the ALJ had suspended all procedural dates pending a further pre-hearing conference. Moreover, between the time of the Review Board's ruling on its amendment and the ALJ's dismissal order, Royce was not idle--it was preparing to prove its qualifications at the hearing. Those efforts culminated in the Park Service letter confirming Royce's authorization to use the Eureka Peak site. Needless to say, Royce was not, as the Court of Appeals would have, "plainly . . . aware that its application might be dismissed . . ." Memorandum, p. 3 (A-4).

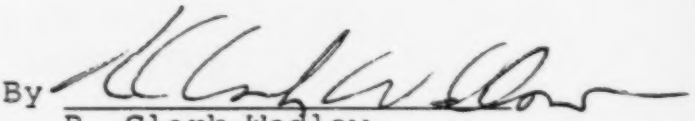
In sum, in view of its statutory right to a hearing and the unbroken Commission precedent, Royce could not have anticipated that findings would be made as to its qualifications without ever having litigated that very issue. On the day the Review Board dismissed Royce's application, Royce was clearly qualified, and Commission precedent required that Royce be provided an opportunity to prove so. This Court's intervention is essential to remedy the injustice perpetuated in this proceeding and to ensure that the Commission does not, in the future, deprive other applicants of their right to a hearing.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,

ROYCE INTERNATIONAL
BROADCASTING COMPANY

By 

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October 3, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
(Entered April 30, 1985)

No. 84-1168 -- Royce International Broadcasting Company v. FCC

M E M O R A N D U M

PER CURIAM: Appellant Royce International Broadcasting Co. ("Royce") was one of several competing applicants for a new FM station assigned by the Federal Communications Commission ("Commission") to Yucca Valley, California. Royce contends here, as it did before the Commission, that the Commission's Review Board arbitrarily denied Royce's petition for leave to amend its application to designate a new transmitter site, and that the Administrative Law Judge presiding over the licensing proceeding acted arbitrarily when, on the motion of one of the competing applicants, he subsequently dismissed Royce's application on the grounds that Royce had no transmitter site. We reject both contentions. The primary, and in

our view sufficient, reason the Review Board gave for denying Royce leave to amend was that Royce had not exercised due diligence in obtaining and specifying a transmitter site. There were ample grounds for that determination, and we shall not belabor them here. Royce correctly notes that Commission precedent stresses that "the due diligence requirement should be interpreted in light of the equities of the case, especially where a proferred amendment is intended to cure a disqualifying defect." Annax Broadcasting, Inc., 87 F.C.C.2d 483, 489 (1981). But is clear that the Review Board recognized that the Annax standard was controlling, and that the Board denied Royce leave to amend because it viewed Royce's behavior as dilatory and found no equities sufficient to outweigh that failing. See Shoblom Broadcasting, Inc., FCC 83R-27, mem. op. at 4 (Apr. 22, 1983), J.A. at 423. Royce has not met its burden of showing that the equities in its favor were

so overwhelming as to make the Board's decision arbitrary and capricious.

Nor do we find any error in the Administrative Law Judge's dismissal of Royce's application. It is uncontested that the Review Board's denial of leave to amend meant that Royce's application bore a disqualifying defect. While it may have been within the judge's discretion to add a site designation issue at the pending hearing rather than dismissing Royce's application, see, e.g., Braverman Broadcasting Co., 55 F.C.C.2d 15, 17 (1975), it was also, as the Review Board held, "procedurally permissible for the ALJ to dismiss Royce's application . . . without first designating and hearing Royce's requested site availability issue." Shoblom Broadcasting, Inc., FCC 83R-65, mem. op. at 3 (Aug. 31, 1983), J.A. at 439. Indeed, it is precisely because denial of leave to amend a disqualifying defect ordinarily implies that the application will be dismissed that the Commission relaxes the

due diligence requirement when considering proposed curative amendments. There would be no need to relax the due diligence requirement on the grounds that the "Public interest is best served by having as many qualified applicants as possible competing for each broadcast facility," Azalea Corp., 31 F.C.C.2d 561, 563 (1971), if an applicant who was denied leave to amend a disqualifying defect was presumptively entitled to have the same underlying issue designated for relitigation at the subsequent hearing set for competing applications.

Royce contends that even if this is so, Royce was entitled to present its opposition to the intervenor's motion to dismiss to the judge before he dismissed Royce's application. Even if we were convinced that the judge erred in this regard, we would view the error as harmless because it is clear that Royce had no reasonable assurance of any transmitter site on June 21, 1983, when its application was dismissed. Beyond that,

Royce plainly should have been aware that its application might be dismissed once the Review Board denied leave to amend. Yet, as Royce conceded at oral argument, it never filed a motion in opposition to the intervenor's motion to dismiss, although it had over four months between the filing of the motion to dismiss and the ALJ's dismissal of the application and almost two months to do so after the Board denied its appeal on the amendment issue and before the judge dismissed the application. Under these circumstances Royce cannot complain that its procedural rights were infringed.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	FCC 84-119
	)	
SHOBLOM BROADCASTING, INC.	)	BC DOCKET NO. 82-135
	)	File No. BPH-800813AA
Yucca Valley, California	)	
	)	
Deanne C. Davis, John J. Davis, Sammy L. Fields, a Partnership d/b/a CORINTHIANS XIII BROADCASTING COMPANY	)	BC DOCKET NO. 82-136
	)	File No. BPH-800825AC
Yucca Valley, California	)	
	)	
BUENA VISTA BROADCASTING COMPANY	)	BC DOCKET NO. 82-137
	)	File No. BPH-800827AA
Yucca Valley, California	)	
	)	
DESERT RADIO, INC.	)	BC DOCKET NO. 82-139
	)	File No. BPH-800829AI
Yucca Valley, California	)	
	)	
ROYCE INTERNATIONAL BROADCASTING COMPANY	)	BC DOCKET NO. 82-140
	)	File No. BPH-800829AC
Desert Hot Springs, California	)	
	)	
For Construction Permit for a New FM Broadcast Station	)	

O R D E R

Adopted: March 29, 1984 ; Released: April 2, 1984

By the Commission:

1. In a Memorandum Opinion and Order, FCC 83R-65, released September 7, 1983, the Review Board affirmed an Order, FCC 83M-2027, released June 21, 1983, dismissing an application (File No. BPH-800829AO) filed by Royce International Broadcasting Company (Royce). Subsequently, in an Order, FCC 83R-89, released November 7, 1983, the Review Board dismissed as unauthorized, an appeal filed by Royce, from, inter alia, an Order, FCC 83M-3419, released September 27, 1983, granting joint requests for approval of settlement agreements filed by the remaining applicants and terminating the proceeding. Now before the Commission are Applications for Review filed October 11 and December 7, 1983, by Royce, and Oppositions filed November 4, 1983, by Corinthians XIII Broadcasting Company, and January 6, 1984 Buena Vista Broadcasting Company.

2. Royce's application was dismissed for lack of a transmitter site. In a pleading filed June 2, 1982, Royce conceded that the

site specified in its application was no longer available. Royce argued to the Review Board that its original site has since become available. However it failed to present affidavits or other documents to the Board in support of its claim. Although Royce now attaches a letter dated July 7, 1983 from the National Park Service concerning its proposed site, Royce has provided no explanation of why the letter was not presented to the Board in a timely manner or of why the letter should be given any consideration at this late stage of the proceeding. Royce has been grossly dilatory with respect to this matter and it has presented no equities which would warrant overturning the determination that it had no viable antenna site when its application was dismissed. Moreover, remand would block the other applicants' efforts to provide expeditious institution of a new FM broadcast station through their settlement agreements. In view of all of these circumstances, there is no public interest in

granting Royce still another chance to demonstrate that it is technically qualified to be a licensee.

3. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed October 11, 1983 and December 7, 1983, by Royce International Broadcasting Company, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	FCC 83R-65
	)	
SHOBLOM BROADCASTING, INC.	)	BC DOCKET NO. 82-135
Yucca Valley, California	)	File No. BPH-800813AA
	)	
Deanne C. Davis, John J. Davis, Sammy L. Fields, a Partnership d/b/a CORINTHIANS XIII BROADCASTING COMPANY	)	BC DOCKET NO. 82-136
Yucca Valley, California	)	File No. BPH-800825AG
	)	
BUENA VISTA BROADCASTING COMPANY	)	BC DOCKET NO. 82-137
Yucca Valley, California	)	File No. BPH-800827AA
	)	
DESERT RADIO, INC.	)	BC DOCKET NO. 82-139
Yucca Valley, California	)	File No. BPH-800829AI
	)	
ROYCE INTERNATIONAL BROADCASTING COMPANY	)	BC DOCKET NO. 82-140
Desert Hot Springs, California	)	File No. BPH-800829AO
	)	
For Construction Permit for a New FM Broadcast Station	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1983 ; Released: September 7, 1983.

By the Review Board.

1. In a recent Order, the Review Board denied Royce International Broadcasting Company's (Royce) appeal from Administrative Law Judge (ALJ) Frederic J. Coufal's ruling which denied Royce's October 22, 1982 petition for leave to amend its application to specify a new transmitter site. Shoblom Broadcasting, Inc., FCC 83R-27, 53 RR 2d 1203 (Rev. Bd. 1983). Subsequently, the ALJ granted a motion to dismiss Royce's application by Corinthians XIII Broadcasting Company (Corinthians) because "Royce has no transmitter site and it is thus without a viable application." Order (hereinafter "Dismissal Order"), FCC 83M-2027, released June 21, 1983. The Board is now considering Royce's July 8, 1983 appeal of the Dismissal Order and Corinthians's opposition to that appeal. For the reasons that follow, we affirm the ALJ's order dismissing the Royce application.

2. In its appeal, Royce asserts that: (1) because all procedural dates were

suspended by the ALJ pending the Board's resolution of Royce's prior appeal, and were not reestablished thereafter, Royce was not given an opportunity to file an opposition to Corinthians' dismissal motion; and (2) because no transmitter site availability issue was ever specified against it following the rejection of its October 1982 site change amendment, Royce had no opportunity to present hearing evidence on that matter. Royce therefore requests a remand of this proceeding to the ALJ so that it can formally oppose dismissal of its application and, in the event the dismissal is rescinded and a transmitter site issue is added against it, it can present evidence on that issue. Royce states that it "is prepared to present evidence that it has continued to pursue final authorization for the [originally-proposed] Eureka Peak site... and that it now has such final authorization." Royce Br. at 3, n.**. Corinthians responds that because Royce knew 14 months before designation of its

application for consolidated hearing that its originally-proposed site was unavailable, Royce was not harmed by the alleged recent procedural deprivations and that Royce's application was properly dismissed because it was defective per se.

3. Royce's appeal will be denied. The ALJ's dismissal of its application following our refusal to allow the October 22, 1982 site change amendment was essentially a ministerial act dictated by the then-prevailing posture of Royce's application -- Royce had been without a viable transmitter site since January 1981 (see paragraph 4, infra), its application was therefore substantially incomplete and "patently not in accordance with the FCC rules, regulations, or other requirements," Section 73.3566(a) of the Rules, 47 CFR 73.3566(a), and Royce was thus unqualified technically to be a Commission licensee. Because Royce conceded in June 1982 that its proposed site was not available (Royce Opp. to Petition to Enlarge Issues

filed June 2, 1982, at 5), there was no "substantial and material question of fact" concerning this matter from that time onward and, therefore, no basis for the ALJ to designate a site issue against Royce under Section 309(d) of the Communications Act of 1934, as amended, before dismissing the application.[1/] See Tele-Media Corporation v. FCC, 697 F.2d 402, 409 (D.C. Cir. 1983); Chuck Stone v. FCC, 466 F.2d 316, 323 (D.C. Cir. 1972). Hence, it would have been procedurally permissible for the ALJ to dismiss Royce's application, sua sponte, even without Corinthians' motion and certainly without first designating and hearing Royce's requested site availability issue. Royce's inability to reply to a document that need not have been filed was nugatory. Moreover, Royce had two months between the time of the Board's ruling on its first appeal and the ALJ's dismissal of its application in which

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1. As explained in paragraph 4, infra, Royce cannot attempt to re-create a hearing issue at this late date.

to seek the ALJ's permission to respond to the motion to dismiss. It did not do so, instead waiting until after the ALJ acted. Procedural "rights" that are not exercised may be deemed waived; pleaders, like academicians, must either "publish or perish."

4. Royce would now have us believe that it never truly conceded loss of its original site (since it remained optimistic "that an ultimate grant of a use permit for this site can still be achieved," Royce Opp., supra, Attachment D, at 3) and that its latest site proposal should not be treated as a new one at all, but simply as a restatement of its original site proposal. Thus, Royce now asserts (without any support) that its former site has again become available. However, this development -- even if true -- is simply happenstance or coincidence. The operative question is: did Royce have reasonable assurance of the site when it said it did. It clearly did not. Having known "at

least as early as January 1981" that its originally-proposed site was unavailable, Shoblom Broadcasting, supra, at 1204, Royce's application became patently defective at that point, and anytime thereafter the defect could only be cured by an amendment accompanied by a suitable good cause showing. Royce's October 22, 1982 amendment failed that test, id., and its present bootstrapping efforts are suspect. But the time for amendments or other redemptive acts has long passed, and Royce's "fatal deficiency" (lack of a viable transmitter site), id. at 1207, has become terminal. The ALJ properly dismissed Royce's application, and any error on his part in not seeking or waiting for a response to Corinthians' motion to dismiss was harmless.

5. ACCORDINGLY, IT IS ORDERED, that the Appeal filed July 8, 1983 by Royce International Broadcasting Company is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jerold L. Jacobs
Member, Review Board

APPENDIX D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	FCC 83M-2027
	)	
SHOBLOM BROADCASTING, INC.	)	BC DOCKET NO. 82-135
Yucca Valley, California	)	File No. BPH-800813AA
	)	
Deanne C. Davis, John J. Davis, Sammy L. Fields, a Partnership d/b/a CORINTHIANS XIII BROADCASTING COMPANY Yucca Valley, California	)	BC DOCKET NO. 82-136 File No. BPH-800825AG
	)	
BUENA VISTA BROADCASTING COMPANY Yucca Valley, California	)	BC DOCKET NO. 82-137 File No. BPH-800827AA
	)	
DESERT RADIO, INC. Yucca Valley, California	)	BC DOCKET NO. 82-139 File No. BPH-800829AI
	)	
ROYCE INTERNATIONAL BROADCASTING COMPANY Desert Hot Springs, California	)	BC DOCKET NO. 82-140 File No. BPH-800829AO
	)	
For Construction Permit for a New FM Broadcast Station	)	

O R D E R

Issued : June 20, 1983 ; Released: June 21, 1983

This will consider the petition to dismiss or deny the application of Royce International Broadcasting Company (Royce) filed by Corinthians XIII Broadcasting Company (Corinthians XIII) on February 2, 1983. The petition is unopposed.

The petition sought dismissal of the Royce application because of the Memorandum Opinion and Order (FCC 83M-395) released February 1, 1983, which denied Royce's petition for leave to amend to show a new transmitter site. The transmitter site which Royce first specified had become, according to a Royce pleading, unavailable to it.[1/] Shortly after the Corinthians XIII petition was filed, permission was granted to appeal the order denying Royce's right to amend, the appeal was taken, and in a Memorandum Opinion and Order released April 22, 1983 (FCC 83R-27), the Review Board sustained the

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1. See Royce Opposition to Petition to Enlarge Issues filed June 2, 1982 at page 5.

order. Royce has no transmitter site and it is thus without a viable application. It is appropriate that the Royce application be dismissed.

Accordingly, IT IS ORDERED that the petition filed by Corinthians XIII on February 2, 1983 IS GRANTED and that the application of Royce International Broadcasting Company IS DISMISSED with prejudice.[2/]

FEDERAL COMMUNICATIONS COMMISSION

Frederick J. Coufal
Administrative Law Judge

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2. Section 1.301 of the rules provides in part that a ruling by a presiding officer which terminates the right of a person to participate as a party to a hearing proceeding may be appealed by that person and that the appeal may not be deferred and raised as an exception to the initial decision. The appeal must be filed within five days after the release date of this order.

APPENDIX E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	FCC 83R-27
	)	
SHOBLOM BROADCASTING, INC.	)	BC DOCKET NO. 82-135
	)	File No. BPH-800813AA
Yucca Valley, California	)	
	)	
Deanne C. Davis, John J. Davis, Sammy L. Fields, a Partnership d/b/a CORINTHIANS XIII BROADCASTING COMPANY	)	BC DOCKET NO. 82-136
	)	File No. BPH-800825AG
Yucca Valley, California	)	
	)	
BUENA VISTA BROADCASTING COMPANY	)	BC DOCKET NO. 82-137
	)	File No. BPH-800827AA
Yucca Valley, California	)	
	)	
DESERT RADIO, INC.	)	BC DOCKET NO. 82-139
Yucca Valley,	)	File No. BPH-800829AI
California	)	
	)	
ROYCE INTERNATIONAL BROADCASTING COMPANY	)	BC DOCKET NO. 82-140
	)	File No. BPH-800829AO
Desert Hot Springs, California	)	
	)	
For Construction Permit for a New FM Broadcast Station	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1983 ; Released: April 22, 1983

By The Review Board:

1. The above-captioned mutually exclusive applications were designated for a comparative hearing by Hearing Designation Order, Mimeo No. 2690, 47 Fed. Reg. 12855, published March 25, 1982, which included a Section 73.315 signal coverage issue against Royce International Broadcasting Company (Royce). On October 22, 1982, Royce filed a petition for leave to amend to specify a change of transmitter site and to supply a supporting engineering showing. By Memorandum Opinion and Order, FCC 83M-395, released February 1, 1983, presiding Administrative Law Judge Frederic J. Coufal (ALJ) denied the Royce petition. Now before the Review Board are Royce's appeal of this denial and an opposition filed by Corinthians XIII Broadcasting Company (Corinthians).[1/] We shall affirm the ALJ's Order because we agree that good cause for filing the

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1. Permission to appeal the Order, required by Section 1.301(b) of the Commission's Rules, 47 CFR § 1.310(b), was granted by the ALJ in FCC 83M-531, released February 11, 1983.

amendment at this late date has not been shown.

2. In his Order, the ALJ applied the established six-point test of good cause for postdesignation amendments set forth in Erwin O'Conner Broadcasting Co., 22 F.C.C.2d 140, 143, 18 R.R.2d 820, 824 (Rev. Bd. 1970):

> ...the moving party must demonstrate that it acted with due diligence, that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessiated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

In particular, he found that Royce was not diligent in its efforts to obtain a viable transmitter site, that acceptance of the amendment would require changes in the hearing issues and additional hearing,[2/] and that the other parties had been prejudiced by

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2. The ALJ conducted hearings with respect to issues other than signal coverage and site related matters in November 1982.

having to address three different transmitter site proposals by Royce involving three different engineering showings and by the resulting delays in the timely completion of the proceeding.

3. Royce asserts in its appeal that it did not learn that the U.S. Department of the Interior "no longer approved" Royce's originally-proposed transmitter site at Eureka Peak, California (within Joshua Tree National Monument) until after it filed its application on August 29, 1980, and that what followed were "persistent efforts to secure a suitable transmitter site, culminating in its October 22, 1982 petition for leave to amend." Royce Br. at 1.[3/] It argues that a proposed

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3. In a February 2, 1981 affidavit, Royce's owner, Edward R. Stolz, II, stated that "of late" park authorities had decided to deny Royce use of Eureka Peak. After unsuccessful investigation of other sites, Royce learned on July 30, 1982 that it could use Wide Peak as a transmitter site and, on September 27, 1982, filed a petition for leave to amend to specify that site. After objection by the other parties that use of Wide Peak would create a short-spacing problem, Royce indicated that its engineer believed a directionalized antenna could reduce the problem, and Royce was given until October 22, 1982 specifically to supplement its

[Footnote continued on next page]

settlement agreement among the other four applicants reduces this proceeding "to a two-party contest," and urges that, "in view of the public interest policy favoring maximum choice among qualified applicants," good cause for accepting the amendment was shown. Id. at 1-2. Royce also maintains that no modification or addition of issues would be necessitated by its amendment because of any changes may be explored under already designated issues. Id. at 3. Finally, it claims that, in denying its petition for leave to amend, the ALJ prejudged the Section 307(b) choice-of-community and contingent comparative issues by implying that Royce's Desert Hot Springs proposal could not be granted because it does not place a 60 dBu signal contour over Yucca Valley. Id. at 4.

4. We agree with Corinthians and the ALJ that Royce has not shown good cause for

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[Footnote continued from previous page] amendment before the ALJ ruled on its acceptability. On that date, Royce filed the completely different engineering showing that is under consideration here, which did not relate to the Wide Peak site, but rather specified a new site near the one now authorized for use by Station KPLM(FM), Palm Springs, California.

its October 22, 1982 amendment. Initially, we find that Royce was far from diligent in locating and amending to specify a suitable transmitter site. At least as early as January 1981 (five months after its application was filed and fourteen months before designation for hearing) Royce knew that its originally-proposed site was not available. See Royce's Opposition to petition to Enlarge Issues, filed June 2, 1982, Attachments B and C, comprised of letters dated January 8 and 12, 1981 from the National Park Service to Mr. Stolz referring to misunderstandings regarding the availability of Eureka Peak and indicating that no transmitter site would be permitted within the national monument boundaries. Indeed, the Park Service letters strongly suggest that Royce may never actually have had reasonable assurance of the original site's availability, because Mr. Stolz apparently misunderstood what the Superintendent of Joshua Tree National

Monument told him regarding the availability of Eureka Peak as a transmitter site.[4/] In addition, although the Stolz affidavits accompanying Royce's appeal aver that Mr. Stolz made some efforts to procure a new site, in the Board's view these efforts are wholly inadequate to explain the 20-month delay between January 1981 and September 27,

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4. In fact, the question of Royce's knowledge of the unavailability of the Eureka Peak site surfaced in a petition to enlarge the issued filed by Corinthians on April 26, 1982, seeking, inter alia, a misrepresentation issue against Royce for having specified the site in the first instance. In response, Royce claimed it had not misrepresented the availability of the site in its application because it was not until it received the national Park Service letters in January 1981 that it was alerted to problems with the site. While the ALJ declined to add a misrepresentation or lack of candor issue for failure of evidence (see FCC 82M-3157, released October 13, 1982, it does appear that in specifying the Joshua Tree national Monument site and maintaining that specification despite the January 1981 letters from the National Park Service without promptly advising the Commission of these developments (see 47 CFR § 1.65), "Stolz has [again] maneuvered as close to the perimeter as should be permitted" (George E. Cameron, Jr. Communications, FCC 83R-20, released March 23, 1983, at para. 52) on this matter of his site specification. At a minimum, however, the National Park Service letters of January 1981 refusing use of the specified site clearly vitiated-more than two years ago-the necessary "reasonable assurance" that the Eureka Peak site would be available.

1982, when Royce finally filed its first transmitter site amendment. See California Broadcasting Corp., 90 F.C.C.2d 800, 809, 51 R.R.2d 1539, 1546 (1982) (interval of more than six months before specifying substitute transmitter site not ordinarily due diligence). And after Royce was granted an extension of time specifically to supplement its September 1982 amendment in order to mitigate the short-spacing problem by directionalizing its antenna, it instead filed the October 22, 1982 amendment, which amendment proposed a wholly new transmitter site. Royce's explanation for this second substitute transmitter site shows further lack of diligence. Mr. Stolz states he had been previously unable to get permission from the licensee of Station KPLM(FM) to use the October 22 site and "only days ago" learned that Southern Pacific Land Company, rather than the licensee, actually owned the site. Stolz affidavit of October 19, 1982 at 1. In other words, at the time that Mr. Stolz

claims to have been negotiating with Station KPLM(FM)'s representative for use of part of their site, he failed to ascertain that they did not own the site and "understood" (or, yet again, misunderstood) KPLM(FM)'s denial of a lease to Royce to be "binding and final"! Id. Due diligence, like ambition, "should be made of sterner stuff."[5/]

5. Where, as here, an applicant is attempting to cure a potentially disqualifying defect in its application, the Commission has held that diligence should be interpreted in light of the equities of the case. Anax Broadcasting, Inc., 87 F.C.C.2d 483, 489, 49 R.R.2d 1589, 1594 (1981). We recently applied that standard in Bison City TV 49 Limited Partnership, 91 F.C.C.2d 26, 52 R.R.2d 63 (Rev. Bd. 1982), in which we concluded that, under the circumstances of that case, the successive submission of four curative financial amendments involving three

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5. W. Shakespear, Julius Caesar, Act, 3 Scene 2, line 97.

different financial proposals over a seven-month period demonstrated, in fact, zealous diligence in the face of "bad luck." Conversely, Royce's failure to produce a single amendment in 20 months is not cured by its submission of two differing amendments in September and October 1982, respectively. While taking due account of Mr. Stolz's explanatory affidavits, we nevertheless affirm the ALJ's conclusion that Royce's allegedly curative efforts were clearly too little and too late.[6/]

6. Furthermore, acceptance of Royce's proffered amendment would be both disruptive of the hearing and prejudicial to the other parties. While we believe that the already specified engineering issue may be broad enough to encompass the new engineering

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6. A different ALJ recently erroneously asserted in Payvision Communications, FCC 83M-1043, released March 31, 1983, at note 2, that the Board's Bison City decision "gutted" the due diligence test because we permitted a fifth curative amendment. The Board looks to both quantity and quality of effort in measuring the "equities" of due diligence, as required by Anax, and so must all other adjudicatory authorities.

problems posed by Royce's latest proposal without technical modification or addition of issues,[7/] we agree with the ALJ that the amount and direction of proof would be increased, as well as hearing time, because of the new proposal's antenna directionalization and shadowing aspects. Not only is this seriously disruptive of the hearing process, but it is also prejudicial to the other

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7. In so ruling, we moot Royce's concern that the ALJ was prejudging the Section 307(b) and contingent comparative issues in this proceeding by implying that that Report and Order which established a Class B FM channel at Yucca Valley, FM Table of Assignments (Yucca Valley), 45 R.R.2d 644 (1979), mandated that the eventual station would be licensed to Yucca Valley or would, at minimum, include Yucca Valley within its 60 dBu contour. (Royce's amended application would do neither.) To construe the Report and Order so narrowly could fly in the face of the "15-mile rule" of Section 73.203(b), 47 CFR § 73.203(b), which makes Class B channels available to be located within 15 miles of the community to which the channel is assigned in the Table of Assignments. And we find no specific language to that effect in the Report and Order. Cf. Campbell and Sheftall, 7 F.C.C.2d 658, 667, 9 R.R.2d 999, 1010 (Rev. Bd. 1967) (a "Section 307(b) determination is a separate, subsequent determination unrelated to the rulemaking" that assigns a channel to a specified community). While the Commission recently repealed Section 73.203(b) in The Suburban Community Policy, 53 R.R.2d 681, 48 Fed. Reg. 12094 (1983), the applications herein are subject to that rule because they were filed before adoption of the repeal order. See 53 R.R.2d at 698.

applicants: they clearly have a valid interest in the prompt resolution of this proceeding and initiation of a new radio service.

7. Finally, we are unable to find the good cause for postdesignation engineering amendments required by Section 73.3522(b)(1)-(i) of the Rules, 47 C.F.R. § 73.3522(b)(1)-(i), i.e., that, "the amendment is necessitated by events which the applicant could not reasonably have foreseen," since it appears from the information set forth in paragraph 4, supra, that Royce had knowledge in January 1981 that its proposed national park site would not be available. Nor, for the same reasons, can we conclude that Royce's proposed engineering amendment is not the result of its voluntary acts. An applicant's lack of due care in choosing a transmitter site cannot be equated with either unforeseeability or involuntariness when the need to resolve pre-existing site problems finally becomes apparent. Cf. California Broadcasting Corp., supra (engineering

amendment in response to subsequent creation of national park deemed unforeseeable and involuntary). To rule otherwise would put a premium on know-nothingism and sanction Royce's reliance on the vain hope that an unfavorable site situation would right itself.[8/]

8. For all these reasons, we affirm the ALJ's denial of Royce's petition for leave to amend. See Belo Broadcasting Corp., 68 F.C.C.2d 1313, 1315-26, 43 R.R.2d 1289, 1293-1304 (1978), rev'd and remanded on other grounds, 88 F.C.C.2d 922, 50 R.R. 805 (1981); Charles W. Hurt, 21 F.C.C.2d 827, 18 R.R.2d 533 (Rev. Bd. 1970); Louis Vander Plate, 20 F.C.C.2d 185, 17 R.R.2d 577 (Rev. Bd. 1969). While the Commission does promote the public

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8. See Mr. Stolz's February 2, 1981 affidavit, at 3:

> "I do believe . . . that an ultimate grant of a use permit for this [Eureka Peak] site can still be achieved at some future time. Nevertheless, should the short-term assessment of this aim appear unfavorable, I would voluntarily request an alternate site . . . ." [The first such "request" to the FCC was filed 20 months later.]

interest goal of a choice among applicants, this policy does "not . . . entirely relieve [applicants] of the good cause requirements" of Section 73.3522 of the Rules and the Erwin O'Conner case. California Broadcasting Corp., supra, 90 F.C.C.2d at 808, 51 R.R.2d at 1545. Lacking the "unusual circumstances" (see paragraph 7, supra) of the California Broadcasting Corp. case, 90 F.C.C.2d at 808, 51 R.R.2d at 1545, but well-endowed with voluntariness, disruptiveness, absence of due diligence, and prejudice to the other parties, Royce's proposed October 22, 1982 amendment must be rejected. Belo Broadcasting Corp., supra. While Royce's argument that an impending merger among the remaining four applicants will destroy the last hope for a choice among applicants, unless Royce is allowed to amend, has surface appeal, cf. Bison City TV 49 Limited Partnership, supra, that merger has not yet been approved. There is also a countervailing public policy favoring the settlement of cases. See Oak Television of

Everett, Inc., FCC 83R-25, released April 7, 1983. Given these competing policy interests and Royce's utter lack of "equities" here, we conclude that a probable loss of choice among applicants is preferable to whitewashing the fatal deficiency in Royce's application and disrupting this proceeding further. The public interest compels a modicum of diligence on the part of applicants so that the initiation of a new broadcast service is not held hostage to the malfeasance (and nonfeasance) of would-be licensees.

9. ACCORDINGLY, IT IS ORDERED, That the appeal filed February 18, 1983 by Royce International Broadcasting Company is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS
Member, Review Board

APPENDIX F

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	FCC 83M-395
SHOBLOM BROADCASTING, INC. Yucca Valley, California	BC DOCKET NO. 82-135 File No. BPH-800813AA
Deanne C. Davis, John J. Davis, Sammy L. Fields, a Partnership d/b/a CORINTHIANS XIII BROADCASTING COMPANY Yucca Valley, California	BC DOCKET NO. 82-136 File No. BPH-800825AG
BUENA VISTA BROADCASTING COMPANY Yucca Valley, California	BC DOCKET NO. 82-137 File No. BPH-800827AA
DESERT RADIO, INC. Yucca Valley, California	BC DOCKET NO. 82-139 File No. BPH-800829AI
ROYCE INTERNATIONAL BROADCASTING COMPANY Desert Hot Springs, California	BC DOCKET NO. 82-140 File No. BPH-800829AO
For Construction Permit for a New FM Broadcast Station	

MEMORANDUM OPINION AND ORDER

Issued: January 28, 1983 ; Released: February 1, 1983

1. This will consider the petition for leave to amend filed by Royce International

Broadcasting Company (Royce) on October 22, 1982, opposition thereto filed by Shoblom Broadcasting, Inc. (Shoblom) on October 28, 1982, comments filed by the Broadcast Bureau (now Mass Media Bureau) on November 2, 1982, petition for leave to file reply and reply both filed by Royce on November 3, 1982, opposition filed by Corinthians XIII Broadcasting Company (Corinthians) on November 12, 1982, supplement to the opposition filed by Corinthians on November 18, 1982, reply filed by Royce on December 8, 1982, comments filed by the Mass Media Bureau on January 10, 1983, petition for leave to file further comments and comments both filed by Corinthians on January 14, 1983, and opposition to petition for leave to file further comments filed by Royce on January 24, 1983.

2. Channel 295B was assigned to Yucca Valley, California, in a Report and Order released April 10, 1979 (see Amendment of Section 73.202(b), Table of Assignments, FM

Broadcast Stations, 44 Fed. Reg. 22740, 45 R.R.2d 644). The assignment included the following explanation:

> Although we do not normally assign a Class B channel to a community of Yucca Valley's size, adequate justification has been provided. The benefits of a wide coverage area station in terms of first FM and first nighttime aural and second FM and second aural service provide the basis for a Class B assignment even if some preclusion might result affecting two small communities nearby. In addition it has been shown that Yucca Valley has undergone rapid growth in recent years which can be expected to continue. In view of this, we shall approve the Class B request instead of the Class A proposal. We shall condition the assignment of Channel 295 to Yucca Valley on the use of maximum Class B facilities so as to insure that the station's signal will provide coverage to the specified unserved and underserved areas.

The Report and Order further provided:

> Any application for this channel must specify facilities of 50 kW effective radiated power and an antenna height above average terrain of 500 feet or their equivalent.

3. Six applications were filed during August of 1980 for the channel. Five of the applications were for a Yucca Valley station; one, that of Royce, was for a Desert Hot

Springs permit.[1/] Desert Hot Springs is presumably within 15 miles of Yucca Valley and therefore qualifies for a Class B channel under Section 73.203(b) of the rules. Of the five Yucca Valley applicants, one has been dismissed with prejudice for failure to prosecute its applications (Total Desert Broadcasting, Inc.) and the remaining four have announced that they are concluding a settlement arrangement which will leave the Corinthians application as the only surviving Yucca Valley application.

4. The matter was designated for hearing in an order released March 16, 1982 (BC 2690) and issues were specified: that areas and populations which would receive primary aural service be determined for each applicant; whether the Royce proposal would provide coverage of Desert Hot Springs as required by the rules; a financial issue against Shoblom; a 307(b) issue because

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1. Desert Hot Springs is one of the two towns which the Commission said might suffer "some preclusion."

different communities were specified; and a contingent comparative issue. A financial issue was added against Royce.

5. When Royce filed its application, it specified as a transmitter site a location at Eureka Peak within the Joshua Tree National Monument. The designation of that site came because a Royce principal, Mr. Stolz, got the impression from a local Park Service employee that it was possible to locate a transmitter at Eureka Peak though the final decision would have to be made by Parks Service officials in San Francisco or Washington. In an affidavit executed on February 2, 1981, Stolz indicated that "of late" park authorities have decided to deny Royce the use of Eureka Peak. Stolz then investigated a site used by station KCMS(FM) at Indio, which resulted in a June 9, 1981 refusal to use by Royce. During some period of time Stolz also sought use of a site controlled by Riverside County, California. That request is still being considered by the

County. Other fruitless inquiries were made by Stolz of the Bureau of Land Management and some private landowners.

6. In any event, on July 30, 1982, Stolz was told by the owner of Wide Peak that Royce could put a transmitter at that location. A petition for leave to amend was filed on September 27, 1982 which described Stolz' search and argued that the Erwin O'Conner Broadcasting Co., 22 F.C.C.2d 140, criteria had been met for a post-designation amendment. Responses to that petition filed by Corinthians and the Bureau pointed out that the Wide Peak location is short-spaced to station KAVO, Fallbrook, California. Royce then asked for a conference at which it indicated that a newly hired consulting engineer believed a directional antenna could minimize the shortspacing problem; it asked for time to supplement its amendment. Royce was given until October 20, 1982 (later extended to October 22, 1982) to supplement the information with respect to its Wide Peak site. Hearing with respect to issues other

than coverage and site related ones was held in early November 1982.

7. Royce's October 22, 1982 filing did not relate to its September proposal but was a request to amend to a new site altogether. The new site is one controlled by Southern Pacific Land Company and is now used by KPLM(FM). In an October 19, 1982 affidavit, Stolz said that he had "relatively recently" checked on the KPLM site and understood from discussions with KPLM people that Royce could not get a lease. "Days" before the affidavit was executed, Stolz learned from the owner that Royce could use the site.

8. A number of objections have been made to the petition for leave to amend. Those with substance are discussed hereafter.

9. In spite of the fact that the assignment of Channel 295 to Yucca Valley requires a maximum Class B facility (50 kW at 500 feet) Royce proposes the use of a directional antenna which, Corinthians claims, will provide maximum coverage in only

the direction of its maximum lobe. This is said to defeat the Commission's intention of providing the Class B channel to Yucca Valley so as to maximize coverage. Royce does not explain why it would use a directional antenna. Corinthians alleges that the reason is to keep the Royce coverage area as nearly as can be within the coverage area depicted in the original proposal. This, it is said, would keep the percentage of difference between the coverage areas to less than 50%; a change of 50% or more would require that the application be assigned a new file number under Section 73.3573 of the rules.

There may be other explanations for the use of a directional antenna. One may speculate that such an antenna might overcome shadowing problems in Desert Hot Springs. The point is not that this speculation is accurate but that it was up to Royce to let us know that its antenna proposal conforms with Sections 73.315 and 73.316 of the rules which discuss the reasons for use of directional antennas.

10. Allied to this problem is the consideration of Royce's 60 dBu contour against Commission concerns when the assignment was made. The Report and Order said the Commission assigned the channel to Yucca Valley because that community expected to be fast growing. That special reason for assigning a Class B FM channel is surely frustrated by a proposal in which the 60 dBu contour does not even reach the location in question.

11. It is argued that these matters may all be treated under the Section 307(b) issue and that the existing issues need not be modified. But issue change or not, there will be an increase in the amount and direction of proof. If the amendment is accepted, Royce will have to address the matters of the use of a directional antenna and the failure to provide service to the area about which the Commission was concerned.

12. The question of diligence is raised respecting Royce's efforts to amend. While

diligence is not the determining factor here, it is useful to note that sometime prior to February 2, 1981 (Royce neglects to mention precisely when) Royce became aware that it had better look for a new site. While it earlier made some efforts in that regard, it was not until some 19 months later that a petition for leave to amend was filed. Royce did not check whether the site mentioned in its September 27, 1982 petition was adequately spaced from existing stations though that is a relatively simple matter to discover. Royce did not locate the site which is the subject of its latest petition to amend until "relatively recently" to the execution of a Stolz affidavit on October 19, 1982. None of these matters indicate diligence.

13. Corinthians alleges that according to predictions based upon National Bureau of Standards Technical Note 101, significant areas of Desert Hot Springs would be unable to receive a 70 dBu or greater signal under the Royce proposal. In its reply Royce

challenges the use of the Note 101 method, it challenges Corinthians' calculations, and it agrees that under the Note 101 method, 12% of the city would not be within the 70 dBu contour. Royce is not specific as to why the Note 101 method is not appropriate. Section 73.684(f) provides for the use of alternate methods when terrain in appropriate areas "departs widely from the average elevation of the 2 to 10 mile sector." That seems to be demonstrated and there is no other apparent reason why the study should be rejected. Twelve percent of the area of the city is not necessarily de minimis. Allowance of the amendment would require the addition of an inquiry into shadowing with respect to the new site.

14. Corinthians also believes that an amendment certification issue is appropriate. Both the report of Royce's Washington engineer and the signature of Stolz, a Californian, on the amendment were affixed the same day. Corinthians argues that this demonstrates Stolz signed the amendment and

forwarded it before seeing the engineering report. This allegation has obvious holes in it even without any explanation.

15. Royce's petition must be denied under the Erwin O'Conner criteria. Royce was not diligent, acceptance of the amendment requires issue change, the changes require additional hearing, and other than parties are prejudiced because they have now had to address three transmitter sites and resolution of the issue at this level has been delayed. The site changes were not voluntary in a strict sense and Royce has eschewed comparative advantage. The criteria require rejection of the amendment.

16. Considering the complexity of some of the issues all the pleadings filed will be accepted.

Accordingly, IT IS ORDERED that the Royce petition for leave to file a reply filed November 3, 1982 IS GRANTED; that the Corinthians petition for leave to file further comments filed January 14, 1983 IS GRANTED;

and that the Royce opposition filed on January 24, 1983 IS DENIED.

IT IS FURTHER ORDERED that the Royce petition for leave to amend filed October 22, 1982 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Frederick J. Coufal
Administrative Law Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 84-1168 September Term, 1984

Royce International Broadcasting Co.,
Appellant,

v.

Federal Communications Commission,
Appellee

ON APPEAL FROM A FINAL ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

FILED: April 30, 1985

Before: WALD, BORK, and FRIEDMAN,* Circuit Judges.

J U D G M E N T

This case was considered on appeal from a final order of the Commission, see 47 U.S.C. § 402(b) (1982), and was briefed and argued by counsel for the parties. We have fully considered the issues presented and find they occasion no need for a published

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a) (1982).

opinion. See D.C. Cir. R. 13(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED that the Commission's April 2, 1984, order is affirmed.

Per Curiam
For the Court

George A. Fisher
Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 84-1168 September Term, 1984

Royce International Broadcasting Company

v.

Federal Communications Commission

BEFORE: Wald and Bork, Circuit Judges; and Friedman, Circuit Judge, U.S. Court of Appeals for the Federal Circuit

FILED: June 21, 1985

O R D E R

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

By:

Robert A. Bonner
Chief Deputy Clerk